Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOAN A. CLABBERS,

Petitioner,

v.

GULFSTREAM AEROSPACE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FRED S. CLARK
Attorney for Petitioner
P.O. Box 8151
Savannah, GA 31412
(912) 233-0300

180488

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Did the United States District Court and Court of Appeals err in finding that Petitioner failed to exhaust her administrative remedies on her Title VII claim against Respondent, where the record shows that the Plaintiff presented herself to the EEOC office and explained her claim to an investigator for purposes of filing a charge of sex discrimination against the Defendant relating to the pay discrepancy and the investigator refused to accept the charge stating that since one U.S. Government agency had made an investigation, it would be superfluous for the EEOC to conduct the same investigation whereby the Equal Employment Opportunity Commission "waived" such by refusing to accept Petitioner's claim?

2. Did the United States District Court and Court of Appeals err in finding that Petitioner failed to file her claim under the Equal Pay Act within the applicable statute of limitations period and that such claim is thereafter barred, where Plaintiff was dismissed in September 2000 and filed suit on March 23, 2001?

3. Whether the Plaintiff proved valid claims for violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964, by demonstrating that she was paid a wage at a rate less than the rate paid to her male counterparts whose jobs were similar to the plaintiff's and whose job performance and title required equal skill, effort and responsibility and which were performed under similar working conditions when the Court did not rule that the Plaintiff failed to make a prima facie case for a claim of disparate pay which would have required the Defendant to rebut the claim by proving that the pay differential was justified thereby creating an issue of material fact?

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Joan A. Clabbers, Petitioner, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

1. United States District Court of the Southern District of Georgia Order granting Summary Judgment to Defendant's and Denying Plaintiff's Cross-Motion for Summary Judgment dated April 22, 2002. (Appendix B).

2. United States Court of Appeals for the Eleventh Circuit Order affirming United States District Court's Order granting Defendant's Motion for Summary Judgment dated January 28, 2003. (Appendix A).

STATEMENT OF JURISDICTION

United States Court of Appeals for the Eleventh Circuit Order denying Plaintiff's petition for rehearing was dated February 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 206(d) of the Equal Pay Act, states:

> 1. No employer having employees subject to any provisions of this section shall discriminate, within any establishment within such employees are employed, between employees on the basis of sex by paying wages to employees in such

> establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work responsibility, and which are performed under similar working conditions . . .

42 U.S.C. § 2000(e)(2) of Title VII of the Civil Rights Act of 1964, states:

> Unlawful employment practices. Employer practices a) it shall be an unlawful practice for an employer 1) to fail to or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin; or 2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case was initiated by Petitioner under the Equal Pay Act and Title VII of the Civil Rights Act of 1964. On April 22, 2002, the Honorable Judge of the United States District Court for the Southern District of Georgia granted Defendant's Summary Judgment on both issues.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the ruling of the District Court. A petition for rehearing was denied to the Petitioner on February 28, 2003.

In its ruling, the United States Court of Appeals stated,

> Before a potential plaintiff may sue for discrimination under Title VII, she must first exhaust her administrative remedies, which requires the filing of a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). For a charge to be timely in a non-deferral state such as Georgia, it must be filed within 180 days of the last discriminatory act. *Wilkerson v. Grinnel Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001). Because the record in this case clearly establishes that Clabbers did not timely file the requisite charge before the EEOC, and that there was no waiver of this requirement by the EEOC the district court did not err in granting summary judgment on behalf of Gulfstream on Clabber's Title VII claim.

The Court went on to discuss Petitioner's Equal Pay Act claim, stating that,

> . . . the EPA does have a two-year statute of limitations unless the plaintiff claims that the defendant's conduct was willful, in which case a three year period applies. *See* 29 U.S.C. § 255(a). Here, the record clearly supports the district court's determination that the statute of limitations bars Clabbers' EPA claim.

REASONS FOR GRANTING THE WRIT

I.

The United States District Court and the Court of Appeals erred in finding that Petitioner failed to exhaust her administrative remedies on her Title VII claim against Respondent, where the record shows that the Equal Employment Opportunity Commission "waived" such by refusing to accept Petitioner's claim.

The plaintiff testified that she went to file a charge of discrimination and the EEOC refused to accept it, because they would have to conduct an investigation that a department of the federal government had already [completed]. (omissions) (*See* Clabbers deposition, pp. 66-67).

A timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to a suit in Federal court for a Title VII violation. *See* Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq.*, *Rys v. U.S. Postal Service*, 886 F.2d 443, 445 (1st Cir. 1989). Rather it is a requirement that "like a statute of limitations, is subject to waiver, estoppel and equitable tolling." *Zipes v. TransWorld Airlines, Inc. et al.*, 455 U.S. 385, 393, 102 S. Ct. 1127 (1982). Because Title VII is not jurisdictional, the failure to comply is not an absolute bar to bringing an action, and is subject to equitable modifications. *Hart v. J.T. Baker Chemical Company*, 598 F.2d 829, 831 (3d Cir. 1979). It could be properly treated as a failure to state a claim upon which relief can be granted under Rule 12(b)(6) and should focus on whether the claimant is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). The court should take all of the factual averments contained in the complaint as true; and, in the end, the court may grant

a motion to dismiss under Rule 12(b)(6) only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank*, 958 F.2d 15, 17 (1st Cir. 1992)

The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead the Court in *Zipes* to that conclusion. *Id.* The legislative history of the amendments also indicates that Congress intended the filing period to operate as a statute of limitations period instead of a jurisdictional requirement. *Id* at 394. In fact, Title VII §§ 2000e-5(e) and (f) does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC and contains to reference to the timely filing requirement. *Id.* at 393. In order to effectuate the broad remedial purposes of the Civil Rights Act of 1964 and Title VII the time limitations should not be treated as inflexible jurisdictional prerequisites, but should be subject to equitable modifications since the act contemplates that complaints will be initiated with the EEOC by lay persons unfamiliar with the complexities of the administrative procedures. *Hart* at 832.

In the instant case, treating such as a statue of limitations, waiver would surely apply even though the claim should not have been adjudicated as time-barred. In arguendo, if the claim was in fact time-barred, waiver would apply because it was the EEOC who heard the presentation but who refused to accept the charge merely because they would have to conduct a second investigation. Therefore, the plaintiff is entitled to pursue her Title VII and Equal pay claim in this discrimination action.

Where disparate treatment on account of sex is alleged, a prima facie case of discrimination may be established either through direct evidence of discriminatory intent or as is more often the case, through circumstantial evidence capable of supporting an inference of intentional discrimination. *See Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998).

Generally the framework requires the plaintiff to show that: (1) he is a member of a protected class, (2) he was qualified for his position, (3) he suffered an adverse employment action, and (4) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of sex, if the employer's actions remained unexplained. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 575-576, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978).

The gender discrimination claim, however, presents a closer question. Decisions in the U.S. Court of Appeals for the Eleventh Circuit have emphasized that the requisite showings that made up a prima facie case are not meant to be rigid or inflexible. *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1525 (11th Cir. 1991); *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590 (11th Cir. 1987). in cases where the evidence did not fit into the classic prima facie case formula, the Court stated

> [a] prima facie case of disparate treatment can be established by any 'proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely

> than not that those actions were bottomed on impermissible consideration.'

Furnco at 576.

Further, the plaintiff can use evidence of time-barred discriminatory conduct to meet their burden of persuasion in a case involving circumstantial evidence of discrimination. *Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir. 1986); *Downey v. S. Natural Gas Co.*, 649 F.2d 302, 304-305 (5th Cir. Unit B June 1981); *Fisher v. Procter & Gambel Mfg. Co.*, 613 F.2d 527, 540 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115, 101 S. Ct. 929, 66 L. Ed. 2d 845 (1981); *Mathewson v. Nat'l Automatic Tool Co., Inc.*, 807 F.2d 87, 91 (7th Cir. 1986). The plaintiff has met and exceeded that burden.

Finally, a charge under 42 U.S.C. § 2000e-5(e)(1) shall be filed within one hundred and eight days after the alleged unlawful employment practice occurred, except where the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice. *Kassaye v. Bryant College*, 999 F.2d 603, 605 (1st Cir. 1993). Here, Petitioner had been dealing with the Office of Contract Compliance regarding her unequal paychecks prior to going to the EEOC. In fact, the EEOC refused to accept her charge of discrimination because it had already been investigated by another department of the government. (*See* Clabbers Deposition, pp. 66-67).

The record shows that the Appellant did what she was required to do, namely report the discrimination to the EEOC. The fact that she could not file the charge was the fault of the EEOC. The ruling, if allowed to stand, creates a conflict

between, the Eleventh Circuit, the First Circuit (*Rys v. U.S. Postal Service*, 886 F.2d 443, 445 (1st Cir. 1989), the Third Circuit (*Hart v. J.T. Baker Chemical Company*, 598 F.2d 829, 831 (3d Cir. 1979)), and the United States Supreme Court (*Zipes v. TransWorld Airlines, Inc. et al*, 455 U.S. 385, 393, 102 S. Ct. 1127). This can only be corrected by an opportunity for the Appellant to have her rightful opportunity to obtain justice through the Circuits and not have it inhibited by the EEOC lies now within this Court.

II.

The United States District Court and the Court of Appeals erred in finding that Petitioner failed to file her claim under the Equal Pay Act within the applicable statute of limitations period and that such claim is thereafter barred, where Plaintiff was dismissed in September 2000 and filed suit on March 23, 2001.

"The Equal Pay Act has a two-year statute of limitations unless the plaintiff claims that the defendant's conduct was willful in which case a three-year period applies." (*See* 29 U.S.C. § 255(a)). In quoting this language, the District Court rejected Ms. Clabber's Equal Pay claim, holding that the Plaintiff/appellant's claim was "time-barred." *Joan A. Clabbers v. Gulfstream Aerospace Corporation* (Opinion, p. 4). Applying this law to the facts yields only one result: that the claim is far from "time-barred."

According to the plaintiff, when asked at the time of her deposition about her current salary, she stated, "I was paid through the end of the year because I had over 20 years with the company. I got 13 weeks of severance pay." (*See* Clabbers deposition, p. 26). Thus, chronologically, the plaintiff left the employ of Gulfstream in September of 2000, thirteen

weeks from the first week in September would have Ms. Clabbers receiving an illegal and disparate salary from Gulfstream until at least the second or third week of December of 2000. At the time the plaintiff received her last check from Gulfstream in December of 2000 the statute of limitations clock began to tick and according to the Equal Pay Act, would not bar a plaintiff until December of 2002. Since this suit was filed on March 23, 2001, it is not barred. As a result, the plaintiff filed in a timely manner and is not barred due to untimeliness as suggested by the U.S. District Court.

The case of *Jenkins v. Home Insurance Co.*, 635 F.2d 310, 310 (4th Cir. 1980), holds that an employee who charges a violation under the Equal Pay Act and who alleges a continuing violation may escape dismissal of the action on statute of limitation grounds if the alleged violation occurred in a series of separate, but related acts, beginning at hiring and continuing throughout the course of employment. The Court in *Jenkins* found that the continuing discrepancy between wages paid to female employees and male employees performing similar duties constituted continuing violations for purposes of periods of limitations under Title VII and the Equal Pay Act where the discrepancy was due to discriminatorily low salary that the employer paid; and such ceased only at the end of Jenkins' employment. *Id* at 312. It is no defense that that the unequal payments began prior to the statutory period. *Gandy v. Sullivan County*, 24 F.3d 861, 864 (6th Cir. 1994). The Court in *Gandy* found that "like its federal counterpart, the New Hampshire Equal Pay Act is violated each time an employer presents disparate paychecks to employees. *Id* at 864. Again, in the First Circuit, "a decision to hire an individual at a discriminatory low salary can, upon

payment of each subsequent paycheck, continue to violate the employee's rights." *EEOC v. McCarthy*, 768 F.2d 1, 3, (1st Cir. 1985) (*quoting Lamphere v. Brown Univ.*, 685 F.2d 743, 747 (1st Cir. 1982)).

Applied to the current situation, the plaintiff's actions will not be time-barred as long as at least one forbidden discriminatory act occurred within the relevant limitations under the Equal Pay Act. *Id.* In the instant case, the plaintiff was able to confirm the violation she suspected when she received the OFCCP communication. For purposes of the statute of limitations, the Equal Pay Act is violated each time the employer presents an unequal paycheck to the employee for equal work. *Id.* Therefore, the cause of action may be brought for any and all violations occurring within the limitations immediately prior to the commencement of the action. *Bergstrom v. University of New Hampshire*, 959 F. Supp. 56, U.S.D.C. New Hampshire (1996). Hence, every paycheck the plaintiff received following her dismissal constituted an ongoing violation insofar as the statute of limitations is concerned. (*See* Clabbers deposition, p. 45).

> Taking into consideration the fact that the suit was filed on March 23, 2001 in conjunction with the disparate pay scale as illustrated by the OFCCP communication, the plaintiff has clearly provided proof of discrimination within the two year period.

See also Conner v. West, 56 Fed. Appx. 229, 231, 2003 WL 236421 (6th Cir. 2003); holding that, nurse's cause of action under the Equal Pay Act began to accrue with her last paycheck for work actually performed.

III.

There is a conflict between the Circuits in determining whether to use the "continuing violation" theory or the "one forbidden discriminatory act' theory in calculating and determining the statute of limitations period for violations of the Equal Pay Act.

As aforementioned, the Fourth Circuit in *Jenkins v. Home Insurance Company*, held that the continuing discrepancy between wages paid to female employees and wages paid to male employees in performing similar duties constituted a *continuing violation* for purposes of periods of limitations under Title VII and the Equal Pay Act where the discrepancy was due to discriminatorily low salary paid to female employee that continued to occur as separate but related acts throughout the course of her employment. The Company was involved in discrimination which ceased only at the end of Jenkins' employment. *Id.* at 3121.

The Sixth Circuit addresses the same issue by ruling that the Plaintiff is not time barred as long as *one forbidden discriminatory act* took place during the relevant limitations. *See Gandy v. Sullivan County*, 24 F.3d 861, 864. And furthermore, that the Equal Pay Act is violated each time that the employee is presented with an unequal paycheck for equal work. *See id.* The Sixth Circuit held in an opinion in *Conner v. West*, 56 Fed. Appx. 229, 231, that a cause of action accrues with the employee's last paycheck.

There is obviously a conflict among the Circuits as to whether the notion of the "continuing violations" theory must be fulfilled or the "one forbidden discriminatory act" is enough to satisfy the statute of limitations. Even so, no Circuit has ever ruled as did the United States District Court for the

Southern District of Georgia and the Court of Appeals for the Eleventh Circuit in Petitioner's case. Petitioner fulfills the requirements found in both the "continuing violations" theory and the "one forbidden discriminatory act" theory and no case in any Circuit has held otherwise. The Courts in the instant case have forgone all precedents set in the rest of the Circuits and come down with a rogue decision.

IV.

Plaintiff proved valid claims for violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964, by demonstrating that she was paid a wage at a rate less than the rate paid to her male counterparts whose jobs were equal to the plaintiff's and whose job performance required equal skill, effort and responsibility and which were performed under similar working conditions thereby resulting in the establishment of an issue of material fact which should have required a reversal of the ruling of the Trial Court.

In order to satisfy the requirements for a valid claim under the Equal Pay Act, Title 29 U.S.C. § 206(d) states that:

> *1. No employer having employees subject to any provisions of this section shall discriminate, within any establishment within such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work responsibility, and which are performed under similar working conditions . . .*

The plaintiff is a female employee who through testimony and documents, compared her status with males who were also supervisors working under the same manager. (*See* Clabbers deposition, pp. 91-95). All of the similarly situated male employees received substantially higher pay than the plaintiff. (*See* Clabbers deposition, pp. 56, 60, 61). Further, her position , skills, responsibilities and efforts were equal to or greater than most of the men who received higher pay. (*See* Clabbers deposition, p. 95). The Plaintiff illustrated in the record that similarly situated male employees received disparately higher wages than similarly situated female employees for the performance of equal work requiring equal responsibilities and skills and under similar conditions. (*Exhibit "1"* attached hereto gives illustrations for the year 2000 through the plaintiff's last pay period on September 20, 2000. *Exhibit "2"* attached hereto gives illustrations for the year 1999. These documents are examples representing many pages of similar data).

The plaintiff has proven the defendant's violation of the Equal Pay Act and Title VII. Gender-based discrimination in rates of pay to employees whether male or female is prohibited by the Equal Pay Act of 1963, which is a portion of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 206(d) (1976), as well as by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Equal Pay Act was directed only at wage discrimination between the sexes and forbids the specific practice of paying unequal wages for equal work to employees of the opposite sex. Title VII on the other hand, forbids discrimination on the basis of gender, race, or national origin in a wide range of employment practices, including hiring, firing, training, and promoting. *Waters v. Turner Wood & Smith Ins. Agency, Inc.*, , 8741 F.2d 797, 801 n.10 (11th Cir. 1989). However, the plaintiff is

entitled to pursue claims under both statutes. *Miranda v. B& B Cash Grocery, Inc.*, 975 F.2d 1518 (11th Cir. 1992).

In order for a plaintiff to make a prima facie case for claim of disparate pay under the Equal Pay Act, the plaintiff must show "the employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992). Once the plaintiff has established a prima facie case, the burden shifts to the defendant to prove that the pay differential was justified under one of the four affirmative defenses in section 206(d): "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or qualify of production; or a differential based on any other factor other than sex." *Meeks v. Computer Associates International*, 15 F.3d 1013, 1016, 1018 (11th Cir. 1994).

The employer's burden differs substantially between the Equal Pay Act and Title VII. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529-31 (11th Cir. 1992). Title VII defendants need only articulate a legitimate nondiscriminatory reason for the challenged action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In addition to the burden of production, Equal Pay Act defendant's bear the burden of proof in justifying a pay inequality. *Schwartz v. Florida Board of Regents*, 954 F.2d 620, 623. It is significant to note that the Equal Pay Act does not require proof of a discriminatory intent. *Miranda* at 1518. A Plaintiff may establish a prima facie case under the act by probing

that a disparity in pay exists between men and women who perform substantially similar jobs. *Meeks* at 1018.

The plaintiff has proven that the work at issue required equal skill, effort and responsibility. In fact, she described the interaction between herself and the various male supervisors in performing their jobs. She testified that she compared herself during her later employment with the seven supervisors that she worked with, who all reported to Bob Douse. (*See* Clabbers deposition, p. 103). She did that because all of their jobs were intermingled. She explained that George Anderson, as supervisor, worked in the stockroom, Tommy Hendley and Tommy Dodd were supervisors in the warehouse and when the people working with her were doing the accounting for the inventory, it was performed in the stockrooms or the warehouse. Dave Wilson was supervisor in the warehouse. When work was performed, all of the employees and supervisors are co-mingled in their jobs. (*See* Clabbers deposition, pp. 103-104). She explained that the jobs were similar and her subordinate did the cycle count or inventory control. However, all of the employees under Bob Dowse were doing similar things, though not identical. Jim Anderson and Andy Anderson were in charge of the stockroom and Dave Wilson, Tommy Dodd, and Tommy Hendley in the warehouse were all controlling the material that the plaintiff and her staff were counting. (*See* Clabbers deposition, p. 104). The plaintiff's staff had to reconcile with the others. (*See* Clabbers deposition, p. 101).

Further, all of the supervisors had the same number of staff personnel under them. (*See* Clabbers deposition, pp. 106, 107). The same arrangement applied when she became a supervisor/dispatcher. (*See* Clabbers deposition, p. 106). The coordination arrangement continued even though

some of the jobs changed. (*See* Clabbers deposition, pp. 108, 109). The same applied when she became a Requirements Planner. (*See* Clabbers deposition, p. 110).

In 1993, there was a change in the company personnel structure so the purchasing business units were formed that were responsible for purchasing different parts for the aircraft. This resulted in creating the raw material section and the power plant section and the Requirements Planner, the Schedulers, the Buyer's the Quality Assurance people were all placed in one organization. (*See* Clabbers deposition, pp. 110, 111). During that time there were men who were performing the same or similar job duties as a Requirement Planner. (*See* Clabbers deposition, p. 111).

In 1994, Plaintiff became a buyer and remained there until 1996. (*See* Clabbers deposition, pp. 112, 113). During that time, she received less pay than the male buyer's because of her sex. (*See* Clabbers deposition, p. 114). She blamed that on the attitude of the Vice President in charge, Roy McGraw. (*See* Clabbers deposition, p. 114).

The plaintiff has proved that the duties she performed as a supervisor were similar to that of other supervisors and her responsibilities were also similar. She has also proven that she is female and that the pay she received was less than that of similarly situated supervisors who were males. The jobs held by the employees of opposite sexes need not be identical; rather they need only be substantially equal. *Corning Glass Works v. Brennan*, 417 U.S. 188, 203, 204 S. Ct. 223, 32-33. The plaintiff is only required to compare the jobs held by the male and female employees and by showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual

employees holding the jobs. *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir. 1985). Because the only submission by the defendant pretextually endeavoring to justify the discrepancy in pay was by attempting to compare the skills and qualifications of the individuals and, according to the Brock case, this should not be considered as anything other than pretextual. It is the jobs themselves and not the employees that are compared, and only the skills and qualifications actually needed to perform the jobs are considered. Therefore, the previous experience of the six listed supervisors as provided by the defendant are inapplicable in his case. *Miranda v. B&B Cash Grocery, Inc.*, 975 F.2d 1518 (11th Cir. 1992). Further, the plaintiff need not prove the job held by the male competitor is identical to hers, she must only demonstrate that the skill, effort and responsibility required in the performance of the jobs are "substantially equal." 29 U.S.C. § 206(d)(1); *Corning Glass Works*, 417 U.S. at 204. Finally, this was further demonstrated but not admitted by the signed OFCCP "Conciliation Agreement," which discussed the alleged violation that Gulfstream had paid women lower than "nonminority men in the accounting/finance, human resources, and materials/ management support job families." *Clabbers v. Gulfstream Aerospace Corp.*, CV401-100 n.3 (April 22, 2002) Quoting, Doc. 26, exhibit 3 at 1-3.)

The plaintiff described the type of duties that she performed as well as the interaction within the departments of the other supervisors and the discrepancy in pay between the similarly situated supervisors, who were male and herself and thus established a prima facie case which the defendant at trial, failed to refute, yet still mysteriously prevailed.

CONCLUSION

The plaintiff proved that she was similarly situated to the male supervisors who became supervisors at the approximate time that she became one. This was an attempt to compare the skills and qualifications of the six similarly situated males who received lighter pay, but not the jobs themselves and the employees and the skills and qualifications actually needed to perform the jobs. This is the evidence that was not proved by the defendant to overcome the plaintiff's prima facie case.

The plaintiff has proven the discrepancy in pay and even the hostile treatment that she suffered. The evidence in the record proved the discrimination to be continuing as illustrated by the further payment of the plaintiff's unequal salary until December of 2000. In addition, the agreement between Gulfstream and the Office of Federal Contract Compliance (OFCCP) together with the earnings report comparison confirmed the disparity in pay. Further, at no time was the plaintiff's claim time-barred since she filed suit in a timely manner well within the statutorily imposed two-year window.

Therefore, Petitioner requests that this Court grant her Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

FRED S. CLARK
Attorney for Petitioner
P.O. Box 8151
Savannah, GA 31412
(912) 233-0300

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 28, 2003

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12329

D.C. Docket No. 01-00100-CV-4

JOAN A. CLABBERS,

Plaintiff-Appellant,

versus

GULFSTREAM AEROSPACE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(January 28, 2003)

Before EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

Appendix A

PER CURIAM:

Joan Clabbers appeals from a final judgment entered in favor of her former employer Gulfstream Aerospace Corporation ("Gulfstream"). Clabbers sued Gulfstream for sex discrimination under both the Equal Pay Act, 29 U.S.C. § 206(d) ("EPA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), alleging that she had been paid less than her male counterparts for the same work. The district court granted summary judgment for Gulfstream on Clabbers' EPA claim on statute-of-limitations grounds and on the Title VII claim for failure to exhaust administrative remedies.

Before a potential plaintiff may sue for discrimination under Title VII, she must first exhaust her administrative remedies, which requires the filing of a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). For a charge to be timely in a non-deferral state such as Georgia, it must be filed within 180 days of the last discriminatory act. *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001). Because the record in this case clearly establishes that Clabbers did not timely file the requisite charge before the EEOC, and that there was no waiver of this requirement by the EEOC, the district court did not err in granting summary judgment on behalf of Gulfstream on Clabbers' Title VII claim.

Unlike Title VII, the EPA does not require plaintiffs to exhaust administrative remedies. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1527 (11th Cir. 1992). However, the EPA does have a two-year statute of limitations

unless the plaintiff claims that the defendant's conduct was willful, in which case a three-year period applies. *See* 29 U.S.C. § 255(a). Here, the record clearly supports the district court's determination that the statute of limitations bars Clabbers' EPA claim.

For the foregoing reasons, the final judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED AND FILED APRIL 22, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

401CV100

JOAN A. CLABBERS,

Plaintiff,

v.

GULFSTREAM AEROSPACE CORPORATION,

Defendant.

ORDER

Plaintiff Joan A. Clabbers brings this Title VII/Equal Pay Act[1] action against Gulfstream Aerospace Corporation. Doc. # 1 exh. A. Contending that her claims are meritless and barred on untimeliness and administrative exhaustion grounds, Gulfstream moves for summary judgment. Doc. # 19. Plaintiff crossmoves for summary judgment on liability. Doc. # 25.

---

1. 42 U.S.C. § 2000e *et seq.* and 29 U.S.C. § 206(d) respectively.

Appendix B

I. *BACKGROUND*[2]

For over two decades (since the mid-1970s) Clabbers worked as a buyer, expediter, supervisor (etc.) for Gulfstream, an aircraft manufacturer. Doc. # 23 at 21, 47, 78. She answered to male supervisors, *id.* at 31-32, 35, and claims they denied her equal pay and promotions because of her sex. *Id.* at 34, 35, 37.

Yet, she never complained (*e.g.* to the EEOC) — fearing retribution, she claims. *Id.* at 35-36, 39-40, 45, 85, 86-87. Plaintiff left Gulfstream's employ in 9/00, doc. # 1 exh. A at 1, but later received a Gulfstream letter informing her that, following a U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP) investigation, it had agreed, without admitting liability, to pay her $4,072 retroactively. *Id.* at 4-6; *see also* doc. # 23 at 45-46.[3]

---

2. This Court applies the summary judgment principles explained in *Mize v. Jefferson City Bd of Educ.*, 93 F.3d 739, 742-43 (11th Cir. 1996) and *Cohen v. United American Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996). Unrebutted, evidentially supported Fact Statements are deemed admitted under S.D.GA.LOC. R. 56.1 and *Dunlap v. Transamerica Occidental Life Ins.* Co., 858 F.2d 629, 632 (11th Cir. 1988).

3. Without admitting liability, Gulfstream signed a 12/12/00 OFCCP "Conciliation Agreement," which noted OFCCP's alleged "Executive Order 11246" violation to the effect that, as of 7/20/99, Gulfstream had paid women lower than "nonminority men in the accounting/finance, human resources, and materials/management support job families." Doc. 26 exh. 3 at 1-3. Gulfstream agreed to compensate alleged victims with backpay and interest, id. at 3 ¶ 10, and that's why it sent Clabbers a $4,072 check.

Appendix B

In early 2001, Clabbers obtained a copy of the Gulfstream/ OFCCP "Conciliation Agreement," *see* doc. # 26 exh. 3; *supra* note 3, and decided to investigate a litigation option. She first contacted the OFCCP, then the EEOC. Doc. # 23 at 66. Yet, she did not tell the EEOC that she was interested in filing a sex-discrimination charge. *Id.* at 68-69. She reasons that she was not dismissed from her job on account of her sex, but that it figured into her unequal pay. *Id.* at 68, 99; *see also* Doc. # 31 exh. A at 2 ¶ 9.

She filed this action on 3/23/01, doc. # 1 exh. A at 1, though she has also joined a class action to vindicate her ADEA[4] rights. Doc. # 23 at 40, 63-64; *see also Cosper et al. v. Gulfstream Aerospace Corporation*, 402CV013 (S.D.Ga. Complaint filed 10/14/01). Despite these claims, Clabbers concedes that she received positive evaluations, promotions, and even an award at Gulfstream during her tenure. Doc. # 23 at 74-77. She further concedes that no one instructed or advised her not to present a sex-discrimination claim to the EEOC. Doc. # 23 at 71-72.

Moreover, she stipulates to her belief that "she was treated differently because of her sex from 1986 to 1992, and is only seeking damages back to 1986." Doc. # 30 exh. A at 2 ¶ 10. For that matter, she "does not claim sex discrimination from 1996 until her [9/26/00] termination," *id.* ¶ 8,[5] but instead seeks

---

4. The Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq.*

5. In that Clabbers has never amended her Complaint, which limits her "sex discrimination" allegations to the role of supporting her Equal Pay claim, the Court construes this stipulation to mean that she is limiting her Equal Pay claim to the time period ending sometime in 1996.

"back pay going all the way back to 1986[.]" Doc. # 23 at 96; *see also id.* at 46 ("I knew from when I became a supervisor on that I was not paid equal to men"); *id.* at 78 (she was "supervisor of the dispatchers" in 1990).

In that respect, plaintiff says she has perceived sex discrimination for many years. *See id.* at 84 (she asserts that she was denied a promotion, because of her sex, in " '90 to '92"); *id.* at 87-90 (she contends she should have, but did not receive a raise from 2/98 - 11/98, yet does not contend that this occurred because of her sex); *id.* at 129 (she believes that, in 1990, she had been kept from advancing to a higher "skill level" rating because of her sex); *id.* at 150-51 (she contends that in 1992 she was discriminated against because of her sex).

Despite her "deposition allegations" of sex discrimination in terms of lost promotions, Clabbers has never amended her Complaint to allege same. *See* doe. # 1 (Complaint) ("Title VII" Count limited to unequal pay discrimination); *see also* doc. # 21 ¶ 31; # 26 (no rebuttal). Gulfstream objects to any constructive amendment under F.R.Civ.P. 15(b).

II. *ANALYSIS*

A. Title VII

The Eleventh Circuit explained that

> [b]efore a potential plaintiff may sue for discrimination under Title VII, she must first exhaust her administrative remedies. The first step down this

> path is filing a timely charge of discrimination with the EEOC. For a charge to be timely in a non-deferral state such as Georgia, it must be filed within 180 days of the last discriminatory act.

Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317 (11th Cir. 2001) (cites omitted); *Edelman v. Lynchburg College*, 122 S.Ct. 1145, 1147 n. 1 (2002) ("A Title VII complainant generally has 180 days from the time of the alleged unlawful employment practice to file with the EEOC, 42 U.S.C. § 2000e-5(e)(1) (1994 ed.). . . .").

On the other hand, "exhaustion is not a jurisdictional requirement for Title VII claims. It is merely a precondition to bringing a Title VII claim in federal court, and is therefore subject to the doctrines of waiver, estoppel, and equitable tolling." *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 819 (7th Cir. 2000). Plaintiffs with stale, unexhausted claims often attempt to overcome the exhaustion bar by invoking an equitable tolling,

> "continuing violation" theory. Under this doctrine, where an employee charges an employer with continuously maintaining an employment practice that is violative of Title VII, she may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice. . . .

Miller v. Bed, Bath & Beyond, Inc., 185 F.Supp.2d 1253, 1262 (N.D.Ala. 2002) (cites omitted). However,

> a continuing violation does not occur simply because the employee continues to feel the effect of a discrete discriminatory act that occurred outside the limitations period. Furthermore, the Eleventh Circuit has indicated that, in the absence of a continuing discriminatory policy, a plaintiff cannot extend the life of an otherwise barred failure-to-promote claim under the continuing violation doctrine, for such an employment action is generally deemed a discrete act of past discrimination.

Id. at 1263 (cites omitted); *see also Geer v. Marco Warehousing, Inc.*, 179 F.Supp.2d 1332, 1337 (M.D.Ala. 2001) (Court applies three-factor test to determine whether alleged discriminatory acts fall within continuing violation exception to 180-day period for bringing Title VII charge with Equal Employment Opportunity Commission (EEOC): (1) subject matter, meaning whether alleged acts involve same type of discrimination, tending to connect them in continuing violation; (2) frequency, meaning whether alleged acts are recurring or more in the nature of an isolated work assignment or employment decision; and (3) perhaps of most importance, degree of permanence, whether act has the degree of permanence which should trigger an employee's awareness of and duty to assert her rights, or which should indicate to employee that continued existence of adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate).

Fear of retaliation does not support the equitable tolling a plaintiff like Clabbers needs to extend the 180-day period for filing an EEOC charge. *Carter v. West Pub. Co.*, 225 F.3d

1258, 1266 (11th Cir. 2000) (plaintiffs, after all, have an independent "retaliation" remedy under Title VII). "Moreover, application of the continuing violations doctrine is not dependent on which statute gives rise to the plaintiff's claim." *Cardenas v. Massey*, 269 F.3d 251, 257 (3rd Cir. 2001).

To the extent Clabbers raises any non-pay based *(e.g.*, failure to promote) Title VII claims, they are barred for lack of exhaustion and timeliness. She admits she knew about alleged gender-based discriminatory actions more than three years before she filed this action. Furthermore, she cannot show a violation for which she seeks relief within the limitations period, so she cannot invoke the continuing violation doctrine in any event. *See Becker v. Gannett Satellite Information Network, Inc.*, 10 Fed.Appx. 135, 2001 WL 538921 at * 4 (4th Cir. 5/22/01) (unpublished) ("Because Becker cannot show a violation within the statutes of limitations, she cannot rely upon the continuing violation principle"). This result moots any Rule 15(b) objection.

B. Equal Pay Act

"Unlike Title VII, the Equal Pay Act does not require plaintiffs to exhaust administrative remedies: *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1527 (11th Cir. 1992)." *Nowlin v. Jones Intercable, Inc.*, 102 F.Supp.2d 1364,1369 n. 1. (S.D.Ga. 2000); *accord Gehrt v. University Of Ill. Urbana-Champaign*, 974 F.Supp. 1178, 1189 (C.D. Ill. 1997) ("There is no exhaustion requirement for administrative remedies under the Equal Pay Act").

Appendix B

"The Equal Pay Act has a two-year statute of limitations unless the plaintiff claims that the defendant's conduct was willful, in which case a three-year period applies. *See* 29 U.S.C. § 255(a)." *Becker*, 2001 WL 538921 at * 4; *accord Smith-Haynie v. District of Columbia*, 155 F.3d 575, 577 n. 1. (D.C. Cir. 1998). Even under the longer period, plaintiff's Equal Pay Act claim is time-barred.

Clabbers must surmount a "high hurdle" before she can successfully invoke equitable tolling on that score. *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579-80 (D.C. Cir. 1998) ("high hurdle" for equitable tolling not met where plaintiff did not understand EEO right-to-sue letter and claimed she was "traumatized and simply unable to psychologically deal with it"); *Moody v. Bayliner Marine Corp.*, 664 F.Supp. 232, 235-37 (E.D.N.C. 1987) (doctor's findings of "panic and anxiety attacks" ultimately resulting in plaintiff's hospitalization held not sufficient to establish equitable tolling on otherwise time-barred Title VII claims), cited in *Dougherty v. Henderson*, 155 F.Supp.2d 269, 277-78 (E.D.Pa. 2001).

Clabbers does not meet the most minimal requirement for overcoming the limitations bar on this claim. Personally feeling "validated" by an independent government agency investigation (the OFCCP's 2000 agreement with Gulfstream), *see* doc. # 23 at 45, does not supply equitable tolling grounds. Subjective awareness *(e.g.*, feeling "validated" about one's claims, and only then acting upon them), rather than an objective standard (what a reasonable plaintiff realized or should have realized vis-a-vis her duty to not sleep on her rights) cannot rule the day here, for it would swallow the

statute of limitations itself. The remainder of plaintiff's arguments are meritless, so it is not necessary to reach Gulfstream's related defenses.

III. *CONCLUSION*

Defendant Gulfstream Aerospace Corporation's motion for summary judgment (doc. # 19) is ***GRANTED***. Plaintiff Joan A. Clabbers's motion for summary judgment on liability (doc. # 25) is ***DENIED***. Her Objection (doc. # 17) to the Magistrate Judge's Order is ***OVERRULED*** as moot, and her Complaint is ***DISMISSED WITH PREJUDICE***.

SO ORDERED, this 22 day of April, 2002.

s/ B. Avant Edenfield
B. AVANT EDENFIELD, Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 28, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12329-HH

JOAN A. CLABBERS,

Plaintiff-Appellant,

versus

GULFSTREAM AEROSPACE CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by JOAN A. CLABBERS is DENIED.

ENTERED FOR THE COURT:

s/ Rose Barkett
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUN 2 6 2003
OFFICE OF THE CLERK

No. 02-1583

IN THE

Supreme Court of the United States

JOAN A. CLABBERS,

Petitioner,

v.

GULFSTREAM AEROSPACE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

WADE W. HERRING, II
Counsel of Record
SHAWN A. KACHMAR
HUNTER, MACLEAN,
EXLEY & DUNN, P.C.
200 East St. Julian Street
Post Office Box 9848
Savannah, GA 31412-0048
(912) 236-0261

Attorneys for Respondent

181498

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

ISSUES PRESENTED

A. Whether the lower courts correctly held that Clabbers' claims of sex discrimination under the Equal Pay Act and Title VII are barred by the applicable statutes of limitation when she filed suit in March 2001, but stipulated that she does not claim sex discrimination from the year 1996 forward.

B. Whether the lower courts correctly held that Clabbers failed to exhaust administrative remedies for any Title VII claims and equitable tolling does not apply, where she never filed an EEOC charge and admits that she was never told that she could not or should not file a charge.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Gulfstream Aerospace Corporation is a wholly-owned subsidiary of General Dynamics Corporation, a publicly-traded company.

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Cited Authorities

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STATEMENT OF THE CASE

Clabbers is not contesting the rules of law applicable to her case. Instead, Clabbers is dissatisfied with how the lower courts applied the law to the facts of her case. The lower court decisions contested here raise no new or novel issues and are not a departure from the accepted and usual course of judicial proceedings. Likewise, the Eleventh Circuit's decision does not conflict with the decisions of other courts of appeals on the same matter. The petition should be denied.

A. Course of Proceedings

On March 23, 2001, Joan Clabbers sued her former employer Gulfstream Aerospace Corporation ("Gulfstream") for alleged sex discrimination, challenging her compensation under both the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). After the close of discovery, Gulfstream moved for summary judgment, arguing that Clabbers' claims were barred by the applicable limitations periods and that her Title VII claims were also barred by her failure to exhaust administrative remedies. Clabbers never filed a charge of sex discrimination with the EEOC. Moreover, Gulfstream contended that Clabbers could not establish substantive claims of pay discrimination under either statute.

The district court granted Gulfstream's motion for summary judgment on failure to exhaust and statute of limitations grounds. Clabbers had admitted that she never filed a charge of discrimination with the EEOC and that she was never told that she could not or should not file a charge. Further, Clabbers stipulated that she did not claim sex discrimination from 1996 forward. Pet., App. B. The district

court concluded that the doctrine of equitable tolling did not save her claims. Pet., App. B at 8a-12a. The court also found that Clabbers could not assert a continuing violation theory because she could not show a violation within the applicable limitations period. Pet., App. B at 8a-12a.

The Eleventh Circuit affirmed the district court's findings on both claims. As to the Title VII claim, the appellate court determined "the record in this case clearly establishes that Clabbers did not timely file the requisite charge before the EEOC, and that there was no waiver of this requirement by the EEOC." Pet., App. A at 2a. As for Clabbers' EPA claim, the Eleventh Circuit concluded "the record clearly supports the district court's determination that the statute of limitations bars Clabbers' EPA claim." Pet., App. A at 3a. Clabbers' petition for rehearing was denied. Pet., App. C at 13a.

B. Statement of Facts

Gulfstream manufactures and services business aircraft. Clabbers began working at Gulfstream in 1975, left for a brief period of time, and returned in September of 1976. She transferred from job to job within the company over the course of her career, reporting to different supervisors in different departments. Clabbers admits that from 1996 forward, there were no men performing the same or similar jobs she performed and that she does not compare herself to any men for purposes of pay during this time period. Pet., App. B at 6a-7a.

Clabbers' employment ended in September of 2000 when she was included in a reduction in force. As part of her severance package, Clabbers received 27 weeks of salary

continuation and severance pay through March of 2001.[1] Six months after her termination, Clabbers filed a complaint in the State Court of Chatham County, Georgia, alleging that throughout her 24 years of employment, Gulfstream did not provide her with pay equal to that given to similarly situated male employees in violation of the EPA and Title VII. Gulfstream removed her claims to the United States District Court for the Southern District of Georgia.

1. *Clabbers Admits She Knew Of Her Pay Claims When They Arose But She Never Filed A Charge*

During the course of the litigation and as part of a proposed pretrial order filed before the district court ruled on the parties' motions for summary judgment, Clabbers stipulated that she "was treated differently because of her sex from 1986 to 1992," and that she "does not claim sex discrimination from 1996 until her termination in September 2000." Clabbers also stipulated that "all of the jobs [in question at Gulfstream] were unique, including hers." In her previously filed brief on summary judgment, Clabbers admitted that "there were no men to whom she felt she could compare herself for pay purposes [from 1996 forward]."

Clabbers testified that from the first incident of alleged sex discrimination in the mid-1980s through every subsequent alleged incident of sex discrimination, she thought at the time that she was being treated differently

1. Clabbers contends that she received a disparate salary through December 2000, even though she ceased working in September of 2000. Employees discharged in the reduction-in-force received various amounts of severance depending upon their time with the company. Affected employees were kept on the payroll at their salaries at the time of termination through the term of their severance.

because of her sex: "Q: And during that period of time [1985/1986-1992/1993], did you believe that you were being discriminated against in pay because of your sex? A: Yes." Clabbers confirmed, "I knew from when I became a supervisor [in the mid 1980s] on that I was not paid equal to the men." She also admitted that she was aware of the EEOC and its function, and that she was familiar with EEOC charges of discrimination. Indeed, in October 2000, Clabbers filed a charge of age discrimination against Gulfstream arising out of her termination in the September 2000 reduction-in-force. Nevertheless, Clabbers never filed a charge with the EEOC alleging sex discrimination.

2. ***When Clabbers Finally Went To The EEOC, She Never Asked To File A Charge And Was Never Told That She Could Not File A Charge***

In July of 2000, the Office of Federal Contract Compliance Programs ("OFCCP") and Gulfstream entered into an agreement wherein Gulfstream agreed to adjust salaries for certain positions but did not admit any liability. Clabbers received a notice of the agreement from Gulfstream along with an offer of backpay in exchange for a release. Clabbers rejected the offer. In March of 2001, Clabbers received a letter from the OFCCP in response to a Freedom of Information Act Request which attached a copy of the agreement between the OFCCP and Gulfstream. According to Clabbers: "When I got the letter from the OFCCP, that validated the feelings and everything that I knew, and I was — I decided to go ahead with it."

Clabbers then went to the EEOC (for the second time, the first being when she filed her charge of age discrimination in October 2000). Although she contends that the EEOC

"refused" to accept a charge of discrimination, her allegation is directly contradicted by her deposition testimony:

> Q: Did you say to anyone at the EEOC I'd like to — I'd like to file a charge of sex discrimination?
>
> A: No.
>
> Q: Did you try to file a charge of sex discrimination?
>
> A: As a result of [the OFCCP] letter?
>
> Q: As a result of anything?
>
> A: No.
>
> Q: Did you say to anyone at the EEOC I want to fill out a charge of sex discrimination and the EEOC said no, you can't?
>
> A: No.

According to Clabbers, the EEOC representative told her that the EEOC would likely not conduct an investigation because the OFCCP had already done so. As Clabbers' testified, however, the EEOC representative did not tell her that she could not or should not file a charge.

REASONS FOR DENYING THE PETITION

A. The Lower Courts Applied Well-Established Law To Find That Clabbers Failed To Exhaust Her Administrative Remedies

Although Clabbers argues that the record shows that the EEOC "waived" any filing requirements by "refusing" to accept Clabbers' charge, the actual evidence in the record belies her contentions. It is undisputed that Clabbers never asked to file a charge of discrimination with the EEOC, nor was she ever told that she could not or should not file a charge. The only question at issue, then, is whether equitable remedies excuse Clabbers failure to file a charge.

The timely filing of a charge of discrimination is not a jurisdictional prerequisite to filing suit under Title VII. Rather, the filing requirements are subject to equitable principles of waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985). Even so, this Court and the lower courts are in agreement that equitable remedies should be applied sparingly. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Irwin v. Veteran's Admin.*, 498 U.S. 89 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984); *Montoya v. Chao*, 296 F.3d 952 (10th Cir. 2002); *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001); *Carter v. West Pub. Co.*, 225 F.3d 1258 (11th Cir. 2000); *Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236 (3d Cir. 1999); *Briley v. Carlin*, 172 F.3d 567 (8th Cir. 1999); *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380 (9th Cir. 1997); *Tyler v. Runyon*, 70 F.3d 458 (7th Cir. 1995); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Rys v. U.S. Postal Serv.*, 886 F.2d 443 (1st Cir. 1989); *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987).

In the instant action, equitable tolling might be justified if Gulfstream or the EEOC somehow misled Clabbers, or if she relied upon Gulfstream or the EEOC to her detriment. *See, e.g., Irwin*, 498 U.S. at 96 (equitable relief granted sparingly, typically in situations where claimant actively pursued judicial remedies but filed defective pleading during statutory period, or where complainant has been tricked by adversary's misconduct into allowing the filing deadline to pass); *Miller*, 766 F.2d at 493-94 ("equitable tolling may be appropriate when a plaintiff has been 'lulled into inaction by . . . state or federal agencies' or 'if a plaintiff is 'actively misled'"'); *Smith v. McClammy*, 740 F.2d 925, 927 (11th Cir. 1984) ("equitable tolling is based upon the actions of someone other than the claimant that are misleading or constituted fraudulent conduct"). Clabbers, however, makes no allegation that Gulfstream, or even the EEOC, misled her. The lower courts properly declined to apply equitable remedies where Clabbers admits that she never asked to file a charge and that she was never told that she could not or should not file a charge.

Moreover, even assuming, *arguendo*, that the EEOC misled Clabbers, the lower courts properly declined to waive Clabbers' filing requirements because, as the district court noted, "She admits she knew about alleged gender-based discriminatory actions more than three years before she filed this action." Pet., App. B at 10a. Clabbers cannot take advantage of equitable remedies when she has not diligently pursued her legal rights. *Irwin*, 498 U.S. at 96 (equitable doctrines inapplicable where claimant has failed to "exercise due diligence in preserving [her] legal rights"); *Baldwin County*, 466 U.S. at 151 ("one who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence").

Although Clabbers cites the decisions of *Rys v. U.S. Postal Service*, 886 F.2d 443 (1st Cir. 1989) and *Hart v. J.T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979) in support of her argument that the Eleventh Circuit's ruling in the present case creates a split in the circuits, the two decisions are instead consistent with this case. Both the *Rys* and *Hart* decisions hold, consistent with *Zipes*, that although Title VII's filing requirement may be equitably tolled, the doctrine is narrowly construed. In fact, both decisions affirmed lower court rulings finding that equitable tolling was inapplicable on the facts presented, as is true in the present case. In *Hart*, for example, the Third Circuit affirmed the district court's determination that equitable tolling was inapplicable because the plaintiff there was aware of the alleged sex discrimination when it occurred but failed to file a timely charge. *Hart*, 598 F.2d at 834. In *Rys*, the First Circuit rejected the plaintiff's argument that he was misled by a letter from the EEOC, in part because the record evidence belied his claim, and because he was less than diligent in pursuing his claims. *Rys*, 886 F.2d at 447-448. The circuit courts are not split, but rather are in agreement.

B. The Lower Courts Applied Well-Established Law To Find That Clabbers' Claims Were Barred By The Applicable Statutes Of Limitation

Charges of discrimination under Title VII must be filed within 180 days of the last discriminatory act. 42 U.S.C. § 2000e-5(e). The limitations period for claims arising under the EPA is two years, three years for willful violations. 29 U.S.C. § 255(a). The limitations period begins running "from the date the employee knows or reasonably should know that he or she has been discriminated against." *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533,

1545 (11th Cir. 1988) (citations omitted). "The purpose of the requirement is to 'put defendants on notice of adverse claims and prevent plaintiffs from sleeping on their rights.'" *Id.*, *citing Parker v. Crown Cork & Seal Co.*, 462 U.S. 345, 353 (1983).

1. *Clabbers Admits That She Has No Claims Within The Applicable Limitations Periods*

Clabbers testified that she was contemporaneously aware of alleged sex discrimination as each new alleged claim arose during her career. Although she argues now that she became convinced of alleged sex discrimination only after receiving the OFCCP letter in March 2001, the district court correctly relied upon Clabbers' deposition testimony wherein she admitted that she knew "from when [she] became a supervisor [in the early 1980s] on that [she] was not paid equal to men." Pet., App. B at 7a.

Just as Clabbers admitted that she had known for years that she believed herself to be the subject of sex discrimination, she also admitted that she has no claims for sex discrimination from 1996 forward. Pet., App. B at 6a-7a. Recovery under the EPA is limited to the two or three year limitations period calculated back from the commencement of an action. 29 U.S.C. § 255(a); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 380 (11th Cir. 1995) ("a plaintiff only recovers unpaid wages for the allowable statutory period"); *see also Pollis v. New School for Soc. Research*, 132 F.3d 115 (2d Cir. 1997); *Gandy v. Sullivan County, Tennessee*, 24 F.3d 861 (6th Cir. 1994); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992). Clabbers' action commenced on March 23, 2001, the date of filing, and any recovery would be limited to alleged wage disparities going

back, at most, to March 23, 1998. Since Clabbers admitted that she has no claim of sex discrimination after 1996, the lower courts correctly concluded that the statute of limitations barred her claims.[2] *See also Morgan*, 536 U.S. at 114 (plaintiff can only file a charge to cover discrete acts that occurred within the appropriate time period).

2. *The Continuing Violation Theory Does Not Save Clabbers' Claims*

Clabbers contends that every paycheck she ever received while at Gulfstream, and even the severance pay received following her termination, started the limitations period anew, and thus her claims are timely. Clabbers did not, however, allege that Gulfstream perpetuated a discriminatory salary structure, nor did she bring a pattern or practice claim. *Bazemore v. Friday*, 478 U.S. 385, 395 (1986); *see also Morgan*, 536 U.S. at 112. Instead, Clabbers alleged that every time she transferred to a new job, under a different supervisor, she experienced disparate treatment anew. Any theoretical "continuing violation" ended when Clabbers transferred to a new position, a new department, or a new supervisor, and was subject to subsequent pay decisions. When Clabbers' allegations are analyzed in conjunction with her admission that she had no claims of sex discrimination at all after 1996, the district court, affirmed by the Eleventh Circuit, correctly concluded that the continuing violation

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2. Clabbers' suggestion, made for the first time in this Court, that the limitations period was somehow tolled during the pendency of the OFCCP investigation into Gulfstream's pay practices is incorrect. *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) ("the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods").

theory was inapplicable. *See Morgan*, 536 U.S. at 112-114 (discrete discriminatory acts are not actionable if time barred); *see also Watson v. Blue Circle, Inc.* No. 01-15432 (11th Cir. March 21, 2003) (same); *City of Hialeah v. Rojas*, 311 F.3d 1096 (11th Cir. 2002) (rejecting application of continuing violation theory because employer had discontinued alleged discriminatory policy); *Pollis*, 132 F.3d at 119 (recurring pay discrimination does not constitute a continuing violation because each receipt of a paycheck is the basis for a separate cause of action for which suit must be brought within the limitations period); *Dasgupta v. Univ. of Wisconsin Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997) (rejecting application of continuing violation theory to pay claim); *Knight v. Columbus, Ga.*, 19 F.3d 579 (11th Cir. 1994) (rejecting application of continuing violation theory to an FLSA claim); *LeBlanc v. City of Tallahassee*, 2003 WL 1485063 (N.D. Fla. 2003) (rejecting application of continuing violation theory, noting that "each pay increase was a discrete act that gave rise to a separate disparate pay claim."); *Peters v. City of Stamford*, 2003 WL 1343265 (D. Conn. 2003) (finding that each paycheck issued to plaintiff constituted a discrete employment action not subject to continuing violation theory); *Inglis v. Buena Vista University*, 235 F. Supp. 2d 1009, 1024-1030 (N.D. Iowa 2002) (discrete claims of pay discrimination not brought as pattern or practice case not subject to continuing violation theory); *Krough v. Cessford Const. Co.*, 231 F. Supp. 2d 914 (S.D. Iowa 2002) (rejecting application of continuing violation theory to wage claim); *see further Lewis v. Oklahoma ex rel. Board of Regents for Tulsa Community College*, 42 Fed. Appx. 160 (10th Cir. June 18, 2002) (unpublished) (because plaintiff was aware that her salary was lower than her male comparators, the continuing

violation theory did not make timely her claim of pay discrimination premised on wages set six and seven years before she filed a charge).

CONCLUSION

Clabbers testified that she was contemporaneously aware of alleged sex discrimination throughout her career but never filed a charge of sex discrimination with the EEOC. She testified she was never told that she could not or should not file an EEOC charge. She testified and then stipulated that she had no claims of sex discrimination after 1996. The Eleventh Circuit properly affirmed the district court's ruling that Clabbers' claims were barred by her failure to exhaust administrative remedies and by the applicable limitations periods. In so holding, the lower courts applied well-established rules of law. The Eleventh Circuit's order is not in conflict with any decisions of this Court or any of the other courts of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WADE W. HERRING, II
Counsel of Record
SHAWN A. KACHMAR
HUNTER, MACLEAN,
EXLEY & DUNN, P.C.
200 East St. Julian Street
Post Office Box 9848
Savannah, GA 31412-0048
(912) 236-0261

Attorneys for Respondent